



September 21, 2011

**Comments of the National Lumber and Building Material Dealers Association  
Regarding a Proposed Rule to Revise the Interpretation of the Advice Exemption**

**RIN 1245-AA03**

Submitted through <http://www.regulations.gov>

The National Lumber and Building Material Dealers Association (NLBMDA) is the national association representing lumber and building material dealers with over 6,000 members operating single or multiple lumber yards and component parts serving homebuilders, subcontractors, general contractors, and consumers in the new construction, repair and remodeling of residential and light commercial structures.

NLBMDA urges the Department to withdraw its proposal to change the long-standing rules governing the disclosure of relationships in the reporting required under section 203 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 433. Specifically, NLBMDA opposes the proposed change in the Department's interpretation of the advice exemption that currently exists in the reporting regime above.

While the Department asserts that the current interpretation requires changing because it is too broad, because it is inconsistent with legislative history now over half a century old, and because it allows for under-reporting of persuader relationships asserted by the Department to now be on the rise, we believe that the proposal unnecessarily changes a disclosure and reporting regime that has long been in use and accepted as part of the policy regime for labor relations. We also believe that the proposal so narrows the meaning of "advice" that it chills the ability of employers to seek legal or other advice and to appropriately invest in good-faith compliance counseling and good-faith communications with employees.

For the last fifty years the Department has exempted from disclosure requirements any advice or materials that consultants may provide to their employer clients for use in communicating with employees regarding their right to organize and bargain collectively, provided the consultants have no direct contact with the employees. The current rules regarding "persuader activity" disclosures are straightforward and work. The current instructions provide useable and balanced guidance. Nothing has changed in the last few years that would argue for the Department's proposal; however, the proposed instructions create new ambiguity over what would now be considered "advice" and what would not be considered "persuader activity". It provides a very limited meaning to "advice," one that seems to rule out anything other than oral or written communication that speaks only to a decision or conduct proposed by the employer, and introduces an expanded meaning of "persuader activity" to include what long-standing policy has specifically considered not to be persuader activity.

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The proposed new limited meaning of “advice” specifically rules out materials or communications that an employer may rely upon in determining how to communicate with its employees. This reverses current policy and creates an unprecedented requirement for employers and their counsel to disclose highly confidential information. It threatens to limit the very nature of confidential communications between the employer and counsel or expert. Given the ambiguity of the proposal, one can only guess at what is now considered “advice” versus “persuader activity”. It seems to suggest that communication is “advice” when an employer asks a consultant “can I do this?” but that communication with the same consultant is “persuader activity” when the employer asks “what can I do?” It also seems to suggest that communication is “advice” when a small business employer takes time away from running a business and drafts materials that it may use with employees, and asks the consultant, “please review,” but that communication is “persuader activity” when the same employer asks the same consultant to “provide me with language that I may use with my employees”.

This limitation of the meaning of “advice” and expansion of the meaning of “persuader activity” threatens the ability of employers to obtain legal counsel and expert advice from experienced labor and employment attorneys and consultants, making it unnecessarily more difficult for employers to access the expert assistance to help them comply with the complex laws governing labor relations.

For the small business, the costs associated with seeking advice and compliance are burden enough, while the chilling effect of the proposed disclosures are unsupportable. Many employers would be effectively prevented from communicating with their employees because, without the help of counsel, they would fear facing a labor violation unintentionally.

To conclude, we do not agree with the Department’s assessment that its current interpretation of the advice exemption is overbroad, or that it is suddenly contrary to 50 year old legislative history, or that its proposal is demanded by alleged increases in persuader activity. Nor do we believe the Department has offered a compelling reason to change this long-standing policy at this time. Further, we believe that the current economic challenges facing business and workers alike argue most strongly against a change in policy of such significance.

For these reasons, NLBMDA urges the Department to withdraw the proposal in its entirety.

Respectfully submitted,

**National Lumber and Building Material Dealers Association**

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